Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 80-60

ELVINA M. HERWEG, by her husband and next friend, Darrell E. Herweg; and *DARRELL E. HERWEG*, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. RAY, Individually and in his capacity as Governor of the State of Iowa; and *KEVIN J. BURNS*, individually and in his capacity as Commissioner of the Iowa Department of Social Services,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents Robert D. Ray and Michael V. Reagen, Ph.D., respectfully pray that a writ of certiorari be denied, and that this Court decline to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on March 18, 1980. Petition for rehearing was denied on April 22, 1980. This case is reported at 619 F.2d 1265.

INTRODUCTION

The question presented by the petitioners in their Petition for Writ of Certiorari, pages i-ii is substantially different from the statement of the issue presented for appeal in the United States Court of Appeals for the Eighth Circuit. See page 2, Brief for Appellants in the Eighth Circuit wherein we find:

> The sole issue for review is whether the district court's decision that the incomes of institutionalized and non-institutionalized spouses may be counted together to determine eligibility for Medicaid and the amount of the contribution of the non-institutionalized spouse violates the Medicaid statutes and regulations.

The difference amounts to the submission of a new issue not presented below.

While we recognize that "the sole sanction available to the Secretary of HHS is the cessation of payments to the state.", the Plaintiffs in the instant case had the very real sanction of the power of the district court in contempt proceedings if the respondents failed to abide by the court's decision. Thus, the reference to allowing "the illegal practice to continue" during the process on page 4 of the Petition is inappropriate.

Other than that, the respondents accept the Petitioner's statement of jurisdiction, the statutes and regulations involved, and the statement of the case, in this matter.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

THE EIGHT CIRCUIT'S DECISION AND THE DECISION OF THE DISTRICT COURT CORRECTLY CONSTRUE THE STATUTES INVOLVED, THE CONGRESSIONAL INTENT, AND THE MEDICAID--SSI RELATIONSHIP.

In harmonizing the Medicaid statutes and the SSI statutes, the Court cannot take the "cafeteria" approach in the analysis. That is, the Court cannot pick and choose the law which best suits its taste. It is essential that the Court consider the entire statutes in question, and there have been critical portions that have been ignored by the lower courts which must now be considered. Mr. Justice Rehnquist in Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) stated that:

> [i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look at the provision as a whole law and to its object and policy.

In addition to the SSI statute, 42 U.S.C. § 1381 et seq. we must also consider the perintent parts of the Medicaid statute, 42 U.S.C. § 1396a et seq.

Section 1396a(a)(17) provides:

A State plan for medical assistance must--

> (17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of the applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter) as would not be dis-

regarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;

The plaintiffs rely on subparagraph (B) while we rely on "unless" clause of subparagraph (D). The entire statute must be read and interpreted as a whole.

In order to understand the Roman numerals used in the above statute, we submit the following table:

Title I 42 U.S.C. § 301 et seq. (1970)
Old Age Assistance (OAA)

Title IV 42 U.S.C. § 601 et seq. (1970)
Aid to Families with Dependent Children (AFDC)

Title X 42 U.S.C. § 1201 et seq. (1970)
Aid to the Blind (AB)

Title XIV 42 U.S.C. § 1351 et seq. (1970)
Aid to the Permanently and Totally Disabled (APTD)

Old
Title XVI 42 U.S.C. § 1381 et seq. (1970)
Aid to the Aged, Blind and Disabled (AABD)

New
Title XVI 42 U.S.C. § 1381 et seq. (Supp. II 1972)
Supplemental Security Income for the Aged, Blind and Disabled (SSI)

Iowa's plan fully complies with subsection (17). Paraphrasing the statute to the facts of the case, the Iowa plan includes reasonable standards for determining eligibility for and the extent of medical assistance under the state plan which (D) shall not take into account the financial responsibility of any individual for any recipient (1) unless it is the individual's spouse or child under age 21, or (2) the person is blind or permanently and totally disabled [if the State provides for eligibility under subchapter XVI

which Iowa does] or the person, (3) is blind and disabled as defined under section 1382c of the United States Code. And with respect to paragraphs A, B, C and D above, provide for flexibility in the application of such standards with respect to income by taking into account the cost (whether in the form of insurance or otherwise) incurred for medical care or for any other type of remedial care recognized under the State plan.

Now, let us consider the legislative history which indicates the intent of Congress. We quote from the S. Rep. 404, reprinted in U.S. Code Cong. & Admin. News, 89th Cong., 1st Session, pp. 1951 and 2018 (1965):

> Eligibility.--...Also where a portion of any deductible or cost sharing required by the voluntary supplementary program is met by a State program, the portion covered must be reasonably related to the individual's income and resources. No income can be imputed to an individual unless actually available; and the financial responsibility of an individual for an applicant may be taken into account only if the applicant is the individual's spouse or child who is under age 21 or blind or disabled.
> * * *
>
> (d) Determination of need for

medical assistance
* * *

> The committee has heard of hardships on certain individuals by requiring them to provide support and to pay for the medical care needed by relatives. The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children even though 21 years of age or older. Such requirements for support may reasonably include the payment by such relative, if able, for medical care. Beyond such degree of relationship, however, requirements imposed are often destructive and harmful to the relationships among members of the family group. Thus, States may not include in their plans provisions for requiring contributions from relatives other than a spouse or the parent of a minor child or children over 21 who are blind or permanently and totally disabled. Any contributions actually made by relatives or friends, or from other sources, will be taken into account by the State in determining whether the individual applying for medical assistance is, in fact, in need of such assistance. [Emphasis added]

In addition to the Medicaid statute, § 1396 et seq., this case involves the Social Security statute pertaining to Supplemental Security Income

(SSI) 42 U.S.C. § 1381 et seq. Judge Ross' opinion (the prevailing opinion in an equally divided court below because it sustained the district court) does a good job of analyzing both statutes involved, as follows:

> Additionally, the SSI statute, § 1382c(f)(1) provides that when an eligible spouse lives with her ineligible spouse, the eligible spouse's income is "deemed to include any income" of the ineligible spouse "whether or not available." Therefore, under the SSI statute there is no need to define the term "available"; its definition is essentially irrelevant. In contrast, the Medicaid statute, § 1396a(a)(17) demands that the standards drawn consider availability, thus, the effort to define "available" must be controlled by the Medicaid statute not the SSI statute.
>
> Although Norman v. St. Clair, supra, and Brown v. Stanton, supra, involved § 209(b) states rather than an SSI-state such as Iowa, it appears that in Norman the Fifth Circuit reached essentially the same result as we do here, by reasoning from the SSI-states' situation to that of a "§ 209(b) state." The court in Norman in discussing the previously cited SSI statute, § 1382 c(f)(1), indicates the following:
>
> "Thus under certain circumstances Medicaid eligibility determinations in an "SSI state" must, because of the

> statutory mandate in the SSI legislation, take into account income that is deemed available, without regard to whether that income is actually contributed. Since this statutory mandate exists concurrently in the Medicaid law with the provision of 42 U.S.C. § 1396 a(a)(17) directing that only income which is "available" be taken into account, it must be concluded that the income deemed to Medicaid applicants pursuant to provisions of law applicable to SSI states is available income which includes income deemed to spouses in SSI states must also encompass income deemed[6] to spouses in the more restrictive programs of the § 209(b) states."

At 1238. [619 F.2d at 1274]

The Petitioners indicate that this case stands alone in its interpretation of the applicable law. We agree there is a divergence of case law authority on this subject, but we insist the courts below were correct. District Judge Stuart stated in the instant case:

> This Court joins other courts in holding that state procedures which "deem" a computed portion of a spouse's income to be available for an institutionalized spouse's expenses by application of an arbitrary formula are contrary to 42 U.S.C. § 1396a(a)(17) as shown by its language and the expressed congressional intent.

443 F.Supp. at 1319.

The key words are "computed portion" and "by application of an arbitrary formula". This leads to Judge Stuart's mandate that "a factual determination in each instance" be made to determine "the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse." 443 F.Supp. at 1319.

The first decision interpreting the controlling statute is Franssen v. Juras, 406 F.Supp. 1375 (D.Ore. 1975). We frankly adopt the opinion of Circuit Judge Goodwin (dissenting) where at pp. 1380-81, we find:

> ...The state subtracts from the gross income and resources of the non-institutionalized spouse the basic welfare standard and imputes the remainder to the institutionalized spouse. While it may be myopic for the state to disregard certain financial dislocations inherent in living apart, as well as the realistic cost of car repairs and mortgage payments, this myopia is not inconsistent with the federal scheme. Federal regulations comtemplate precisely such a computational technique in analogous evaluations of gross income available to "medically needy" aid recipients or applicants. See 45 C.F.R. § 248.21(a)(3)(i)-(ii) (1973). The same method surely cannot be so "unreasonable" here as to confound the state scheme under the Supremacy Clause.

* * *

The more difficult issue is whether the "actually available" language of regulations implementing 42 U.S.C. § 1396a(a)(17)(B) cancels out, in effect, the provision of § 1396a (a)(17)(D) permitting states to take certain relative responsibilities into account.

The plaintiffs have conceded that since financial eligiblity for Medicaid is determined by requirements of the categorical assistance programs, the exceptions built into those programs with respect to the presumption of availability of income and resources apply for the purpose of determining the amount of medical assistance. The effect of this concession is to temper the seemingly absolute prohibition against imputation of income not actually made available which emerges from a strict reading of 42 U.S.C. § 1396a(a)(17)(B), the legislative history of this provision, and 42 C.F.R. § 248.21(a)(2)(i) (1973). Imputation is proper, then, when the spouse of an aid recipient is "living with him in the same household." 42 U.S.C. § 1382c(f)(1).

The next question is whether this exception is to be read literally to preclude imputation when one spouse is institutionalized. The plaintiffs urge that spousal income imputation should be strictly limited to the situation where spouses are living

> together in the same physical space. They argue that imputation is rational in this situation alone because (1) only when two spouses physically live together do they enjoy economies of scale such as shared rent, and (2) only when they physically live together is actual sharing sufficiently probable to justify the presumption.
> * * *
>
> The plaintiffs make no showing that the likelihood of actual sharing is significantly reduced by an involuntary separation resulting from the institutionalization of one spouse.
>
> It is more plausible to read the exception as continuing to apply even after such involuntary separations. If the spouses are physically living together in the same household immediately prior to the institutionalization of one spouse, then the institutionalization must be viewed as a temporary absence from home necessitated by illness. Any other interpretation would allow the non-institutionalized spouse to thwart at will the policy of 42 U.S.C. § 1396a(a)(17)(D), which permits states to take into account spouses' financial responsibility to one another. [Emphasis added]

Judge Stuart quoted from the Franssen majority at p. 1319 of 443 F.Supp. that the "prohibition against assuming sources of income is not in-

tended to permit one spouse to spurn a normal obligation to support and assist the other merely by refusing to make contributions." 406 F.Supp. at 1378. The majority stated that nothing in their decision would prevent Oregon from reenacting a relative responsibility law and making it applicable to Medicaid. This is not only a cumbersome, after-the-fact method, but also, a cruel and ineffective method. If a person qualifies and is eligible for aid, why go back later and sue under a relative responsibility statute? Congress did not intend this! Congress addressed this issue in subpart (D) of subsection (17) and the courts ought to give proper recognition to this part of the statute as it relates to the whole. The Herwegs fit squarely within the "unless" clause of this portion of the law.

Burns v. Vowell, 424 F.Supp. 1135 (S.D.Tex. 1976), is a preliminary injunctive action challenging the Texas Medicaid regulations. Again, this is a case the Petitioners usually cite. At p. 1141 of 424 F.Supp., we note:

> At the hearing, Plaintiffs' counsel represented that Mr. Burns would be willing and able to pay up to $152.00 toward Mrs. Burns' care rather than the $394.00 which Defendant has de-

> manded, but at this point in the proceedings the Court is not going to attempt to treat the question of reasonable allocation of financial responsibility on an ineligible noninstitutionalized spouse, or the question of what are the proper procedures for the State to employ.

Judge Stuart's order, of course, "treats the question of reasonable allocation" and the proper procedure for the state to employ. The manual materials and methods of calculations were specifically considered. The Plaintiffs want deeming in reverse. That is, by employing a simple formula, they would conclude that income was not available. This was rejected by Judge Stuart:

> However, it seems to the Court that "deeming" is contrary to Congressional intent whether income of the noninstitutionalized spouse is deemed available or unavailable. [Emphasis added] [443 F.Supp. at 1320]

The plaintiffs are unwilling to accept the concept that "deeming" is a two-way street. We submit the District Court is right. We cannot assume that income is unavailable simply because a spouse refuses to pay a nursing home bill. Most elderly people want to pay their bills.

Judge Stuart's order provides for a case by case determination to make sure that such payment is fair and equitable.

In Manfredi v. Maber, 435 F.Supp. 1106 (D.Conn. 1977), the Court wisely avoids the use of the word "deeming". The phrase "interspousal income attribution" is not much of an improvement, however. Perhaps we should simply use the statutory language and recognize that the financial responsibility of an individual will be taken into consideration when dealing with a spouse. The buzz word "deeming" is not adequate to convey the intent of Congress as express in this statute pertaining to medicaid. The Court concludes that Connecticut's interspousal income attribution regulations are arbitrary. 435 F.Supp. at 1115. Judge Stuart's order in the instant case answers this by the individual factual determination. This complies with the statute.

For other reasons why the District Court's opinion is correct, we return to Judge Ross' opinion in the Eighth Circuit:

> There are also additional reasons for finding SSI eligibility requirements inapplicable to the institutionalized spouse situation. In the institutionalized spouse sit-

uation there is a "gap", which as we will explain, has been closed by states such as Iowa, by electing to cover optional groups.

Congress apparently linked SSI and Medicaid because a person who needs financial assistance to live (SSI) would naturally need financial assistance for medical care. However, under 42 U.S.C. § 1382(e)(1)(B)(i) the maximum SSI benefit payable to an institutionalized individual who does not have an eligible spouse is $300 per year or $25 per month reduced by non-excluded income. Congress authorized this amount for institutionalized individuals "to enable them to purchase small comfort items not supplied by the institution." H.R. Rep.No. 92-231, 92nd Cong., 2d Sess. 3, reprinted in [1972] U.S.Code Cong. & Admin.News, pp. 4989, 5136. However, since the $25 payment is reduced by nonexcluded income, it seems apparent that many institutionalized individuals would not be eligible for SSI benefits although they would be in dire need of Medicaid. This "gap" in the SSI-Medicaid scheme was remedied by providing that a state may provide Medicaid coverage to optional groups, including (1) those who are SSI eligible but do not receive benefits, 42 C.F.R. § 435.210; (2) those who are ineligible for SSI because of lower income standards used to determine eligibility for institutionalized

individuals, but who would be SSI eligible if not institutionalized, 42 C.F.R. § 435.211; and (3) institutionalized individuals who are not SSI eligible but who have income below a certain level. 42 C.F.R. § 435.231 (federal funds are available only for those persons whose income is below 300 percent of the SSI individual benefit amount, 42 C.F.R. § 435.1005).

In the situation where states such as Iowa elect to provide medical coverage to optional groups, some of whom are not eligible to receive SSI benefits, we find the rigid and costly imposition of unreasonable SSI regulations inappropriate and unfair to the taxpayer and welfare recipients of the state. Each state is limited in the total amount its legislature will appropriate. If it is forced to pay the entire cost of institutionalizing a person whose spouse has more income that he reasonably needs, optional coverage will of necessity be reduced or eliminated in other areas. [Emphasis added. [619 F.2d at 1275]

We note that the Petitioners, (p. 30 Petition for Writ of Certiorari) say that the state "can drop coverage of the optional categorically needy,..." This is not in the best interest of the aged, blind or disabled nor is it consistent with the statutory provisions

which, of course, express the Congressional intent.

CONCLUSION

For the reasons presented above, a writ should not issue.

Respectfully submitted,

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